

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application No.: 09/919,747
Inventor: Joseph C. Murray
Filing Date: 08/01/2001
Title: Insulating Packaging Material and
Related Packaging System
Art Unit: 3728
Examiner: Luan K. Bui

VIA EFS

Mail Stop Petition

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

ATTN: DIANE GOODWYN AND THURMAN PAGE

**REQUEST FOR RECONSIDERATION AND RENEWED PETITION TO
REVIVE UNINTENTIONALLY ABANDONED APPLICATION UNDER 37 CFR
§ 1.137(b) AND MPEP § 711.03(c)**

I. Introduction

In response to the Office's Decision on Petition of August 1, 2008, the Owner and Assignee of the above-captioned U.S. Patent Application, (09/919,747, "the '747 application"), ThermaFreeze Products Corporation ("ThermaFreeze"), hereby requests reconsideration of the Decision and again requests the revival of the '747 application. The instant response is believed to be fully responsive to the points raised in the Decision. **The entire delay in responding to the February 7, 2005 Office Action was unintentional.** A check in the amount of **\$770** was enclosed with the original petition, and it is believed no additional petition fees are necessary at this time. Applicant hereby petitions for a **one month** extension of time under 37 CFR § 1.136(a) to extend the response deadline from October 1, 2008 to **November 1, 2008**. Please charge the small entity one month extension of time fee of **\$65** (Fee Code 2251) to the undersigned's Deposit Account, No. **50-0932**. If any additional fees are required to maintain this

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petition, or if an overpayment has occurred, please charge/credit same to the undersigned's Deposit Account, No. **50-0932**.

In brief, Applicant certainly had no intention to delay responding to the outstanding Office Action of February 7, 2005 –and, indeed, had no knowledge whatsoever of that Office Action– during Period (1) or Period (2) identified in the Decision on Petition. The inventor and president of ThermaFreeze, Joseph Murray, was never, at any point, informed by Mr. Pugh (the then-responsible patent attorney) that there was any correspondence at all from the PTO for the '747 application, let alone the February 7, 2005 Office Action. As such, there was absolutely no way for Mr. Murray or ThermaFreeze to have done or considered to do anything at all about Mr. Pugh's failing to respond to this Office Action. The Applicant only first became aware the application had been abandoned even once on September 28, 2007 when his current attorneys (the undersigned) informed him as such. Indeed, the undersigned informed Applicant that the '747 application had been abandoned **three** times (failure to respond timely to a Notice to File Missing Parts of 2001; failure to respond timely to Restriction Requirement of July 2003; and failure to respond to the February 2005 Office Action) on September 28, 2007, to which Applicant responded with stunned surprise and silence.

Regarding Period (1), the Office has requested that Mr. Pugh explain why the application became abandoned, when Mr. Pugh became aware of the abandonment of the application, what efforts he made to respond to the Office Action, and with whom the matter was discussed. The Office points out that the record is unclear concerning intent prior to the abandonment date. Alternatively, if Mr. Pugh cannot answer, Applicant is

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requested to explain “why this application became abandoned and what efforts were made to further reply and with whom the matter was discussed.”

Mr. Pugh is unavailable, on several levels. As Applicant has already indicated, Mr. Pugh is completely incapacitated, and he cannot answer any of these questions to any degree, let alone to anyone's satisfaction. Also, his wife has moved him away to aid in his recovery, and his location is now unknown and he is completely unreachable.

As to intent, Applicant has stated before and does so again with more particularity below and in a Supplemental Declaration that it was always his intention and his company's intention to maintain the '747 application and to respond to any issues raised by the Office. The inventor, Joseph Murray, had on multiple occasions prior to and contemporaneously with the 2005 Office Action instructed Mr. Pugh to maintain the '747 application. Applicant was the ultimate decider as to whether to continue to prosecute a patent application or not; Mr. Pugh was merely Applicant's representative to the Office and was supposed to carry out Applicant's wishes and instructions. Mr. Pugh failed to do so for this application, and actually allowed it to go abandoned on three separate occasions without informing Mr. Murray either that any correspondence had come from the Office or that he had failed to respond to same. There was no way for Mr. Murray to know nor to suspect that Mr. Pugh was not maintaining the '747 application as he was instructed to do.

Regarding Period (2), the Office requires an explanation as to why Applicant “waited for more than a year after learning of Pugh's limitations” to seek new counsel. First, Applicant had no idea that Mr. Pugh was permanently incapacitated for quite some

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time; in fact that knowledge was not confirmed until November 2007, after new counsel had already been retained. Second, Applicant did not know that an Office Action had even been mailed in 2005 until new counsel told him so in late September 2007. This was not a case of a deliberate action on the part of Applicant to allow the application to go abandoned. Rather, it was a case of an Applicant reasonably relying on his patent attorney to maintain and prosecute an application pursuant to Applicant's standing and repeated instruction, with the latter failing to do so. Bear in mind, the PTO has allowed many applications to sit unexamined for years; as such, Applicant's not having received an update from his patent attorney concerning the status of the '747 application is, unfortunately, not that unusual on its face.

II. Facts that Further Support Applicant's Assertion Of Its Intention To Maintain '747 Patent Application

A. Time Period Leading Up To Abandonment

During 2002-2005, as mentioned in the initial Petition, Applicant was extremely ill, yet he still kept in contact with Mr. Pugh periodically. (Supplemental Declaration of Joseph C. Murray, hereinafter "Supp'l Murray Dec.", at ¶ 4.) Mr. Murray always instructed Mr. Pugh to maintain the '747 application. (Id.) Mr. Murray sent a number of e-mails to Mr. Pugh with such instructions, and received back from Mr. Pugh acknowledgement of same. (Id.) Unfortunately, Mr. Murray's records of these e-mails were destroyed as a result of Hurricane Katrina in 2005. (Id.)

Both via e-mail and over the telephone, Mr. Pugh assured Mr. Murray that he would work on the '747 application when the time came. (Id.) Mr. Murray was never

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informed that the Office had sent any correspondence to Mr. Pugh concerning the '747 application. (Id.) Mr. Murray thought that, by expressly instructing Mr. Pugh not to abandon the '747 application, if the Patent Office asked for additional documentation or information, he would be informed. (Id.)

Mr. Pugh never mentioned to Mr. Murray or anyone else at Assignee company that he had received an Office Action or any other such communication from the Patent Office. (Supp'l Murray Dec. at ¶ 5.) As explained in detail in the initial Petition, it was only on September 28, 2007 that Mr. Murray became aware there even was a 2005 Office Action, and it was the undersigned who told him so. Mr. Murray and Assignee company were completely unaware of any of the three abandonments of the '747 application until September 28, 2007. (Id.)

Around the time of the '747 application's abandonment in May of 2005, Mr. Murray underwent his second major surgery in which a baseball-sized tumor and 20% of his liver were removed. (Supp'l Murray Dec. at ¶ 6.) During the rest of 2005 and the first portion of 2006, he underwent very extensive chemotherapy. (Id.) At some point during that period, he inquired of Mr. Pugh as to the status of the '747 application. (Id.) Mr. Pugh reassured Mr. Murray that everything was being taken care of and in order. (Id.) He had no way of knowing that that statement was inaccurate. Mr. Pugh never mentioned to Mr. Murray that the Patent Office had examined the '747 application. (Id.) All of the correspondence from the Patent Office went to Mr. Pugh; none of it went to Applicant, Assignee, or anyone else. (Id.) No one but Mr. Pugh knew what was going on with the '747 application, and Mr. Pugh never told Mr. Murray. (Id.) To this day,

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Mr. Murray has no idea why Mr. Pugh let it go abandoned despite Mr. Murray's instructions and intentions to the contrary. (Id.)

Thus, from the filing of the '747 application up until and beyond its improper abandonment by Mr. Pugh, Mr. Murray and his company fully intended to maintain the '747 application and not to allow it to go abandoned.

B. Re-energizing the Business and Replacing Mr. Pugh as Patent Counsel: June 2006 - July 2007

Shortly after being diagnosed as cancer-free on June 6, 2006 --still completely unaware the '747 application had been examined and abandoned-- Mr. Murray began to re-assume the duties and responsibilities of attempting to commercialize his inventions almost at once. (Supp'l Dec. at ¶ 9.) As part of revitalizing the company, Mr. Murray had the responsibility to refurbish an 18,000 square foot building, including completely replacing the roof. (Id.) He also had to oversee --and sometimes personally physically accomplish-- the moving of production equipment, office furniture and equipment, etc. into the new facility. (Id.) During the period of June 2006 through July 2007, he was hard at work rebuilding his business, sometimes working 18 hours a day, often seven days a week in this regard.

As mentioned in the previous Petition, when Mr. Murray telephoned Mr. Pugh to determine the status of the '747 application in June 2006, Mr. Pugh suffered a major debilitating stroke while they were speaking on the telephone. (Supp'l Murray Dec. at ¶ 10.) After that telephone call, over the course of the next several months, Mr. Murray made numerous attempts to try to reach Mr. Pugh. (Supp'l Murray Dec. at ¶ 11.) On one

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occasion, Mr. Murray spoke with Mrs. Pugh, who indicated that Mr. Pugh was not well, that he actually had suffered a second major stroke on the other side of his brain. (Id.) On at least one subsequent occasion, Mr. Murray was able to reach Mr. Pugh directly. (Id.) In none of those post-stroke telephone conversations was Mr. Pugh coherent nor did Mr. Pugh make any sense. (Id.)

For several months after July 2006, Mr. Murray did not know if Pugh would recover sufficiently to return to work, and he had all the files and records. (Supp'l Murray Dec. at ¶12.) Mr. Murray still did not know of any outstanding office actions at this point. As time went on, he called the Pugh home/office every two to four weeks for the next year, i.e., until June 2007. (Supp'l Murray Dec. at ¶ 13.) Those calls were placed at all times of the day and evening, yet no one returned his messages. (Id.)

At the end of 2006, only a few short months after the fateful phone call with Mr. Pugh, even though he still did not know about the 2005 Office Action, it became clear to Mr. Murray that he needed to find new patent counsel. (Supp'l Murray Dec. at ¶ 15.) He began his search locally in Mobile, AL. (Id.) As time went on, he widened his search for a patent attorney to Birmingham and Atlanta, although the fees for firms in these areas were much larger than Pugh's. (Id.) Mr. Murray understood the seriousness of the situation, yet without knowing that the application had been examined and abandoned already, there was no reason for him not to search for new patent counsel methodically and carefully. Mr. Murray and Assignee had spent a tremendous amount of money on the patent portfolio, and they wanted to ensure that their next patent attorneys would be the right fit for them. (Suppl. Murray Dec. at ¶ 15.)

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From the end of winter and towards the end of the spring of 2007, Mr. Murray realized his company needed to reorganize and recapitalize. (Supp'l Murray Dec. at ¶ 16.) During the early summer of 2007, current counsel and the undersigned were retained for these purposes. (Id.) The decision was made not to look further for other patent attorneys since Pryor Cashman also has patent attorneys. (Id.)

Thus, from the time of the fateful June 2006 telephone conversation between Mr. Murray and Mr. Pugh until new patent counsel was retained, Applicant and Assignee fully intended to maintain the '747 application and not to allow it to go abandoned.

The details of the interaction between current counsel and Mr. Murray appear in the previous Declaration and are not at issue. Clearly, the abandonment and all of the delay in responding to the February 2005 Office Action were unintentional. As soon as the abandonment was discovered, Applicant acted quickly and instructed his new attorneys to act to revive the application.

III. Argument: Applicant Was As Diligent As Possible from the Time the '747 Application Went Abandoned Until the Petition Was Filed, and the Office Is Required to Accept Applicant's Statement to That Effect As True

A. The Unintentional Standard Is Lower Than The Unavoidable Standard

A former Commissioner of Patents spelled out the underlying standards of reviving an expired patent application in *In re Katrapat*, 6 USPQ2d 1863 (Comm'r Pat. & Trademarks 1988):

[The word "unavoidable"] is applicable to ordinary human affairs, and requires no more or greater care than is generally used and observed by prudent and careful men in relation to their most important business. It

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permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present.

In re Katrapat, 6 USPQ2d at 1866 (quoting *Ex parte Pratt*, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat 1887)). This statement was made in connection with unavoidable abandonment of an application, a much higher standard than the unintentional standard under which the instant petition is sought. Yet even under the unavoidable standard, it is still taken into account that, to put it bluntly, things happen, and that no one performs his or her duties completely free from error or without incident. It was entirely reasonable for Applicant to rely on Mr. Pugh --a seemingly and previously “worthy and reliable” registered patent attorney who had drafted and filed the ‘747 application-- for maintaining and prosecuting the ‘747 application.

**B. The Office Must Rely on Applicant’s Statements Made in Support of A
Petition to Revive An Abandoned Application**

Additionally, the Office has acknowledged on multiple occasions that it must rely on the truthfulness of the statements made by Applicants seeking to revive an abandoned application. For example, the Office wrote in the Federal Register in announcing the addition of the unintentional standard under § 1.137(b):

While it is possible for an applicant to make a misleading statement that the delay was unintentional to obtain revival of an abandoned application, **the Office simply must rely upon the candor and good faith of those prosecuting patent applications** (e.g., it is

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equally possible for a party to fabricate evidence and obtain the revival of a long-abandoned application on the basis of unavoidable delay). Any applicant obtaining revival based upon a misleading statement that the delay was unintentional may find the achievement short-lived as a result of the question of intentional delay being raised by third parties challenging any patent issuing from the application.

62 FR 53162 (October 10, 1997), emphasis added. The Office reiterated this position in the Official Gazette of the Patent Office in its August 31, 1999 edition:

The PTO relies upon the applicant's duty of candor and good faith and usually accepts the statement that "the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional" without requiring further information in the vast majority of petitions under 37 CFR 1.137(b). This is because the party presenting a paper is obligated under 37 CFR 10.18 to inquire into the underlying facts and circumstances when the party provides this statement to the PTO....

Off. Gaz. Pat. Office, August 31, 1999, now codified verbatim in MPEP

§711.03(c)(II)(C) (Rev. 6, at 700-191).

Thus, in the vast majority of petitions to revive filed under the unintentional standard, the Office simply accepts the applicant's statement that the entire delay was unintentional. The form to file for such a petition is remarkably short, and the "entire delay" statement that appears on the form is literally one sentence long. This one sentence is sufficient for the "vast majority" of cases.

There are some cases --the very small minority-- where this single sentence is insufficient. However, in those cases:

Even if the PTO requires further information in a petition under 37 CFR 1.137(b), the petition under 37 CFR 1.137(b) is significantly less burdensome to prepare and prosecute than a petition under 37 CFR

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1.137(a). The PTO is almost always satisfied that “the entire delay...was unintentional” on the basis of statement(s) by the applicant or representative explaining the cause of the delay (accompanied at most by copies of correspondence relevant to the period of delay).

Off. Gaz. Pat. Office, August 31, 1999, now codified verbatim in MPEP

§711.03(c)(II)(C) (Rev. 6, at 700-191).

C. Applicant Has More Than Adequately Shown That The Delay Was Unintentional

Applying the unintentional standard outlined above (not the more stringent unavoidable standard) to Applicant's petition, it is respectfully submitted that the original petition already went far beyond the usually sufficient single sentence statement that the entire delay was unintentional. Applicant has, rather comprehensively, explained the cause of the delay. Applicant has declared, under penalty of perjury and invalidity of any to-issue patent, to a great many facts, including the following:

- he took the reasonable and prudent step of hiring a patent attorney to write and prosecute the '747 application;

- he had instructed the patent attorney repeatedly to prosecute and maintain the '747 application, and the attorney indicated that he would;

- he never had any intention of letting the '747 application go abandoned, and he never expressed any such intention to abandon to his attorney; and

- he was never informed by his patent attorney of the February 7, 2005 Office Action, and did not learn of it until September 28, 2007 from the undersigned.

The Office has cited three judicial opinions for the proposition that “it is pointless

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for the USPTO to revive a long abandoned application without an adequate showing that the delay did not result from a deliberate course of action.” (Decision at 3.) Applicant’s Petition and the facts supporting same pass muster under all three opinions. First, the Federal Circuit decision, *Lumenyte Int’l Corp. v. Cable Lite Corp.*, 1996 US App LEXIS 16400 (Fed. Cir. July 9, 1996) is an unpublished, non-precedential decision. Even so, Applicant does not run afoul of the facts of that decision. The district court in *Lumenyte* found that the witnesses’ oral testimony was not credible in light of the contrary documentary evidence. Here, there is no documentary evidence that contradicts Applicant’s sworn statements; in fact, the documents submitted only support the Applicant’s position.

The facts of the present petition are also substantially different from those of the *Lawman Armor Corp. v. Simon*, 74 USPQ2d 1633 (D.C.E.Mich. 2005) opinion. In *Lawman*, the delay in revival from the time of abandonment was over three years; here it is a little more than two years, and it is less than three months from the date the abandonment was actually discovered. Further, in *Lawman*, that applicant had a coherent, functioning attorney who actually informed the client about the Office Action and actively and repeatedly sought instructions from the client on how to proceed; the same cannot be said of Mr. Murray’s representative, who never told Mr. Murray about the February 2005 Office Action, or any of the other missed deadlines in the ‘747 application. Finally, the applicant in *Lawman* waited over a year after his attorney had told him (two years after abandonment) that there was no possibility of revival to file a petition to revive. By contrast, once Mr. Murray was made aware his application was

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abandoned, he wasted no time in filing a petition to revive this application, and one was on file in under three months from the date the application was discovered to be abandoned.

The instant facts also differ from those of the third opinion cited by the Office, *Field Hybrids, LLC v. Toyota Motor Corp.*, 2005 US Dist. LEXIS 1159 (D.Minn. Jan 27, 2005). In the *Fields Hybrids* opinion, there was evidence that the applicant's attorney had received the Office Action, spoken to the client, and received instructions from the client not to proceed with the prosecution of the application (i.e., not to respond to the Office Action). These facts, particularly the "do not proceed" instructions from the client to the patent attorney, show an intentional abandonment on the part of the client. Not so with Mr. Murray, who repeatedly and affirmatively instructed his patent attorney to maintain the '747 application.

From the facts presented above, and those presented in the original Petition, it is clear that **Mr. Murray never had any intention of allowing the '747 application to go abandoned, not in 2005, nor at any point since then.** Mr. Murray hired Mr. Pugh to prosecute his patent applications and instructed him to pay the maintenance fees for other issued patents, and Mr. Pugh failed to do so, although he advised Mr. Murray that he had. There was no reason for Mr. Murray to doubt Mr. Pugh or assume that Mr. Pugh was not doing the job he was tasked to do; indeed, Mr. Pugh's credentials were impressive (see previous Negrin Dec. Exhibit A), and he had successfully written three patent applications for Mr. Murray. Mr. Pugh was a registered patent attorney, and Mr. Murray relied on Mr. Pugh for, among other things, prosecuting the '747 application. Mr. Pugh

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failed to do so.

As it turns out, Mr. Pugh failed to do a lot things in the course of representing Mr. Murray and prosecuting the patent portfolio. He failed to pay the 3 ½ year and 7 ½ year maintenance fees for the '962 patent; he failed to pay the 7 ½ year fee for the '845 patent; and he failed to pay the 3 ½ year fee for the '189 patent. And, of course, he allowed the instant '747 application to go abandoned on *three separate occasions* by not filing timely responses to a Notice to File Missing Parts, a Restriction Requirement, and a first Office Action. (Negrin Dec. at ¶ 5 and Exhibit B thereto.) Only in retrospect, it appears that something was wrong with Mr. Pugh, perhaps a decline in health that manifested itself in forgetfulness or carelessness. Unfortunately, there was no one else in his office to pick up the slack, as he appears to have been a sole practitioner since at least 2004. (See, e.g., Negrin Dec. Ex. A.) There was also no way to tell at the time of the abandonment that something was amiss with Mr. Pugh.

Even if there were some external evidence of something going awry with Mr. Pugh, Mr. Murray was in no position to take significant steps to check up on the previously reliable patent attorney whom he trusted. Mr. Murray was, literally, deathly ill from cancer for nearly the entire period of time the patent application had been abandoned and the other patents expired until his fateful phone call to Mr. Pugh on June 2006. After losing substantive contact with Mr. Pugh following June 2006, Mr. Murray was hard at work rebuilding his company, and still he had no idea that an Office Action had been mailed a year earlier, let alone that it was unanswered and that the application had become abandoned.

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Mr. Murray is, quite frankly, lucky to be alive, luckier still to be able to work and attempt to commercialize the inventions and the ThermaFreeze patent portfolio. It would not have been reasonable for Mr. Murray --while enduring the trials of surgery, chemotherapy, and radiation therapy-- to be expected to maintain sufficiently close contact with his patent attorney over 1300 miles away to make sure Mr. Pugh was doing what he was repeatedly instructed to do. Indeed, even a perfectly healthy client would have had no indication something was wrong and thus no motivation to follow up, especially in light of Mr. Pugh's repeated assurances. Further, given that the Office does "not engage in double correspondence with an applicant and a patent practitioner" (37 CFR §1.33(a)), there is no way Mr. Murray would have been able to be informed of the 2005 Office Action other than from Mr. Pugh.

IV. Conclusion

Despite two debilitating bouts of cancer, a patent attorney who dropped the ball (and was subsequently incapacitated by strokes), and even Hurricane Katrina, Mr. Murray never intended to allow the '747 application to go abandoned. He did what he was supposed to do --hire a registered patent attorney to represent his interests and carry out his instructions. That attorney failed to do so. Penalizing Applicant for his previous attorney's failure here would be unreasonable and unconscionable, and would raise the threshold far above "unintentional" to even beyond "unavoidable", essentially to "impossible." Reconsideration is therefore respectfully requested.

Should the Office require any additional information, the Office is earnestly

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invited to contact the undersigned telephonically or via e-mail prior to dismissing or denying the petition or the instant request for reconsideration.

Prompt and favorable action toward the granting of this petition and the revival of the '747 application is earnestly solicited.

Respectfully submitted,

Dated: October 21, 2008

/Barry E. Negrin/
Barry E. Negrin
Reg. No. 37,407
Attorney for Petitioner

CUSTOMER NO. 67883
Pryor Cashman, LLP
410 Park Avenue
New York, NY 10022
212-326-0249
212-515-6960
bnegrin@pryorcashman.com